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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Carriage of the Transmissions)
of Digital Television Broadcast Stations)
)
Amendments to Part 76 of the Commission's Rules)
)
TO: The Commission)

CS Docket No. 98-120

COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

October 13, 1998

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SUMMARY

With this proceeding, the Commission has the opportunity, at long last, to complete the regulatory piece of the initial digital television roll-out. The Commission and Congress have recognized from the start that cable carriage of digital broadcast signals is critical to the ultimate transition of the public's local, universally available broadcast service from analog to digital. That is why Congress required the Commission to initiate this rulemaking and why the Commission must conclude it promptly. Because cable controls access to nearly 70% of all television households and may control a much greater percentage of DTV early adopters, what the Commission decides in this rulemaking may largely determine the digital choices consumers will have. Throughout these comments, we emphasize the need for swift action. This proceeding should have been concluded already, before significant numbers of digital signals came on the air and designs were finalized for the first generations of digital set-top boxes and receivers. The sooner the Commission resolves this proceeding, the more likely it is that broadcasters will be able to negotiate effectively for programming and carriage deals, the more likely it is that the Congressional DTV implementation goals will be met, the more likely it is that consumers will enjoy the benefits of compatibility among various pieces of digital equipment, the sooner equipment prices will come down, and the more and better digital programming options will exist.

The questions the Commission must settle in this proceeding concern the very pith and marrow of broadcast television – whether the system of locally based stations will survive, whether the cable gatekeeper or the local broadcaster will control the look and feel of the broadcast signal, whether consumers will be able to access competing video services from the same digital receiver, whether cable systems will control the navigation of video services,

and whether the cable consumer will be able to receive the full array of free digital broadcast services (including data like closed captioning and V-chip information) for a reasonable price. Also at issue, of course, is whether cable customers will receive digital signals at all, particularly those that cable systems do not want to carry for competitive or other reasons.

The DTV transition is for the public's benefit and should be structured in a way that is consumer friendly. The cable carriage rules we recommend are designed with this goal in mind. MSTV recognizes that some cable systems face capacity constraints in the near term that may make carriage of digital signals difficult and could disrupt existing programming line-ups. We propose a way to avoid this result. Broadcasters have long supported flexibility in the digital must carry rules and, in these comments, we flesh out one way to implement these rules. Our proposal is premised on the principle that cable operators, which control an essential facility in the digital programming market, should not be allowed to discriminate against digital signals as cable adds new program services. Thus, as a cable system increases capacity (whether by way of additional bandwidth or the conversion of analog channels to digital), it should be subject to DTV must carry requirements, including requirements that protect smaller stations and late adopters. This approach generally will avoid the displacement of existing cable programming.

So much of the attention surrounding the release of the Notice in this proceeding has focused on the question of digital must carry, that the other important cable carriage issues may be overlooked. Our comments focus to a large extent on these other issues that will arise in both retransmission consent and must carry situations. The Commission is obligated by statute and policy commitments to adapt the existing rules to the digital environment and to do so promptly. Among the issues these comments address are: network nonduplication and syndicated exclusivity, digital signal non-degradation, digital signal integrity, cable service tier

placement of digital signals, digital signal navigation, and electronic program guides. For many stations, these issues are as important as the specific digital must carry formula the Commission adopts. These rules enter into every relationship cable systems and commercial broadcasters have. They govern carriage of stronger and weaker stations, larger and smaller market stations, network affiliates and independents. The Commission will have neglected its duty if it fails to promptly clarify how these rules apply in the digital environment. Not only will clear rules further the policy goals of the Communications Act, but they will remove much of the uncertainty that now clouds the introduction of DTV – uncertainty about programming rights, service distribution, and the technical capabilities of digital equipment.

Broadcasters are taking the DTV transition deadlines set by Congress and the Commission seriously. Most stations are meeting or beating those deadlines, no more than 40 set their sights on a November air date. Many more have already invested millions of dollars per station to put out a digital signal that very few in their markets will receive. Cable systems and others may urge that the Commission wait to adopt digital cable carriage rules until there are more DTV viewers. We believe the Commission has already waited too long to implement the Communications Act's cable carriage rules with respect to digital signals. It is unfair and unwise to expect broadcasters to roll out a replacement service at great expense without any assurance that there will be any regulatory consistency between the replacement service and the service it replaces. Further, it almost goes without saying that DTV viewership will not grow unless digital signals are made available, without degradation or compromise, through cable systems.

We urge the Commission to complete this proceeding promptly in accordance with Congressional will, regulatory prudence, and precedent.

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**COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

The Association for Maximum Service Television, Inc. ("MSTV") submits these comments to the Commission's Notice of Proposed Rulemaking (the "Notice") in this proceeding, issued July 10, 1998. MSTV has been a vigorous participant in each step of the decade-long process of creating and implementing the nation's first free, over-the-air digital television service ("DTV"). On behalf of our hundreds of member stations across the country, we have helped shape the policies that have led to the impending introduction of DTV.¹ We

¹ See Joint Broadcaster Comments, MM Docket 87-268 (November 30, 1988) ("*DTV Joint Broadcaster Comments I*"); Joint Broadcaster Comments, MM Docket No. 87-268 (December 20, 1991) ("*DTV Joint Broadcaster Comments II*"); Joint Broadcaster Comments, MM Docket No. 87-268 (July 17, 1992) ("*DTV Joint Broadcaster Comments III*"); Joint Broadcaster Comments, MM Docket No. 87-268 (November 16, 1992) ("*DTV Joint Broadcaster Comments IV*"); Broadcasters' Proposed ATV Allotment/Assignment Approach, MM Docket No. 87-268 (January 13, 1995) ("*DTV Joint Broadcaster Comments V*"); Joint Broadcaster Comments, MM Docket 87-268 (November 20, 1995) ("*DTV Joint Broadcaster Comments VI*"); Joint Broadcaster Reply Comments, MM Docket 87-268 (January 22, 1996) ("*DTV Joint Broadcaster Comments VII*"); Joint Broadcaster Comments, MM Docket 87-268 (July 11, 1996) ("*DTV Joint Broadcaster Comments VIII*"); MSTV Reply Comments, MM Docket 87-268 (August 12, 1996) ("*DTV MSTV Comments IX*"); Joint Broadcaster Comments, MM Docket 87-268 (November 22, 1996) ("*DTV Joint Broadcaster Comments X*"); MSTV Petition for Further Notice of Proposed Rulemaking, MM Docket 87-268 (January 10, 1997) ("*DTV MSTV Petition XI*"); Broadcasters Caucus Reply, MM Docket 87-268 (January 24, 1997) ("*DTV Joint Broadcaster Comments XII*"); MSTV Petition for Clarification, MM Docket 87-268 (June 13, 1997) ("*DTV MSTV Petition XIII*"); MSTV Comment on and Opposition to Petitions for Reconsideration, MM Docket 87-268 (July 18, 1997) ("*DTV MSTV Comments XIV*"); MSTV Reply to Oppositions, MM Docket 87-268 (July 31, 1997) ("*DTV MSTV Comments XV*");

offer these comments on the policies that will, in large part, determine whether or not consumers will be able to access local DTV signals universally, without disruption or inconvenience, and with the assurance that they will enjoy the full functionality of those DTV signals and the sets that display them.

I. INTRODUCTION

The *Notice* poses numerous questions, but makes very few proposals, on a wide range of issues that are of critical importance to the implementation of DTV. While recognizing the Commission's obligation to adopt rules regarding how and whether cable systems carry DTV signals, the *Notice* suggests that such rules could be adopted piecemeal or late in the DTV transition process. The *Notice* intimates that the invisible hand of market forces could carry the DTV transition forward in a satisfactory way until regulatory action is called for. This suggestion is fundamentally at odds with the entire regulatory structure of our broadcast system and, in particular, previous Commission and Congressional directives on DTV.

DTV is not yet the creature of market forces, but of a governmental decision to transition by 2006 the nation's locally-based analog television service to a locally-based digital service, subject to similar or greater obligations to provide this service to local communities. Broadcasters have been eager and active participants in this regulatory plan and are moving ahead in accordance with it. The Commission now has a duty, prescribed by law, public policy and past precedent, to finish the job it started when it adopted a DTV transmission standard, allocated DTV spectrum, and ordered broadcasters to build DTV facilities. It must protect the

Ex Parte Submission of MSTV, MM-Docket 87-268 (November 20, 1997) ("*DTV MSTV Comments XVI*"); MSTV Comments, MM Docket 87-268 (December 17, 1997) ("*DTV MSTV Comments XVII*"); MSTV Comments on Petitions for Further Reconsideration, MM Docket 87-268 (May 22, 1998) ("*DTV MSTV Comments XVIII*"); and Opposition of MSTV, MM Docket 87-268 (May 22, 1998) ("*DTV MSTV Comments XIX*").

public interest in these investments of spectrum and resources by making appropriate policy decisions about how cable and broadcast distribution of the DTV signals should interact. Failure to take such steps, and to take them promptly, will send a message to broadcasters, consumers, and equipment manufacturers that the DTV transition will be slow, rocky, and of uncertain outcome. Failure to make the right cable carriage decisions and implement them soon will:

- Signal to broadcasters that they will be launching a service at great expense without any certainty of reaching the audiences they are licensed to serve, protecting the programming rights for which they have contracted, controlling the quality of signals they have devoted so many resources to develop, or competing on an even footing with subscription video services;
- Signal to equipment manufacturers that, whatever functionality they build into DTV receivers for over-the-air DTV signals, there is no assurance that such functionality will work when DTV signals are transmitted by cable; and most importantly
- Signal to consumers that they may have to struggle to access DTV signals, to tolerate consumer equipment that is not fully functional, compatible with multiple services, or long-lived, and to lose the distinctly local content that their broadcast stations provide.

MSTV urges the Commission to resist the appeal of inaction or delay. Far from being a wise exercise of regulatory restraint, such inaction would be an abdication of a duty to complete the policy process started in 1988 with the advanced television transition. The rules adopted, or not adopted, here will shape the competitive landscape of television for the next century. The Commission must match its actions with its goals. For DTV to succeed (and the government to recover broadcast spectrum), consumers must have access to it over cable and through DTV receivers that are reasonably priced and broadly functional. This means that there must be interfaces between the receivers, on the one hand, and cable, broadcast and satellite technologies, on the other, that allow viewers to exploit the full functionality of digital services and equipment. If digital cable set-top boxes are to be commercially available, there must be open standards that vest as much control over equipment functionality as possible with the

consumer.² If cable is to face more effective competition, broadcasters with the capability to provide the highest quality local programming must not be excluded or disadvantaged in accessing cable households.³ If the model of local broadcasting with a diversity of voices is to continue, rules preserving marketplace and signal integrity must be adapted for the digital environment.

Section One below addresses the policy underpinnings of this proceeding: how this proceeding fits into broadcast regulation as a whole and how prompt action on the entire range of cable carriage issues is mandated by statute. Section Two addresses what specific cable carriage rules the Commission should adopt with respect to *how* DTV signals are carried and *whether and when* DTV signals are carried.

II. REGULATORY UNDERPINNINGS OF CABLE CARRIAGE PROCEEDING

A. The FCC Should Promptly Complete The Regulatory Process To Preserve Localism And Facilitate The Mandated DTV Transition

At stake in this proceeding, as the *Notice* recognizes, are the ability of consumers to access their local DTV signals through cable and the speed and ultimate success of the DTV

² See Report and Order, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 98-116 (adopted June 11, 1998, released June 24, 1998), *petitions for recon. and appeal pending* ("Navigation Devices Report & Order").

³ Congress has clearly expressed an interest in more competition for cable. See, e.g., Cable Rate Increases: Hearing Before the Senate Comm. On Commerce, Science & Transportation, 105th Cong. (July 28, 1998); Video Competition: Multichannel Programming: Hearing on H.R. 2921 and H.R. 3210 Before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Comm. on Commerce, 105th Cong. (Apr. 1, 1998); Broadcast Retransmission Fees: Satellite v. Cable: Hearing on S. 1422 Before the Senate Comm. on Commerce, Science & Transportation, 105th Cong. (Feb. 2, 1998); Video Competition: Access to Programming: Hearing Before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Comm. on Commerce, 105th Cong. (Oct. 30, 1997); Video Competition: The Status of Competition Among Video Delivery Systems: Hearing Before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Comm. on Commerce, 105th Cong. (July 29, 1997).

transition.⁴ What the *Notice* has not recognized as clearly is that this proceeding has broad implications for the core value of television broadcasting – its growth out of, and service to, local communities. By acting promptly to resolve the wide range of cable carriage issues (going far beyond the single question of whether cable systems must carry the DTV signals), the Commission will provide the necessary structure for local stations to plan for and invest in the transition to DTV and will preserve the structure of local broadcasting.

Television broadcasting's regulatory context suggests four central principles that should guide the Commission as it establishes digital cable carriage rules. The Commission should adopt cable carriage rules that: recognize and further the longstanding goal of localism at the heart of broadcast regulation, preserve the environment in which local station signals can fairly compete, support the DTV service as a replacement for the existing analog service, and encourage the swift transition to DTV with minimal disruption to the consumer.

1. The System Of Broadcast Regulation Has Long Been Premised On The Concept Of Local Stations Serving Local Markets

Section 307 of the Communications Act obligates the Commission to manage the limited television spectrum so that, to the extent possible, all communities are served by local stations.⁵ The Commission is also required to oversee the use of the spectrum so as to serve the “public interest, convenience, and necessity.”⁶ In fulfilling its obligation to ensure that local communities are served by local broadcast stations which serve the public interest, the Commission has made television broadcasting among the most highly-regulated of

⁴ *Notice*, ¶ 1.

⁵ 47 U.S.C. § 307(b) (“[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same.”).

⁶ *Id.* § 307.

communications services.⁷ Broadcasters are required to provide a good quality signal to their communities of license.⁸ They must also serve those communities by fulfilling children's programming and political broadcasting obligations, among other duties.⁹ And it is the concept of localism and the desire for diversity that underlie the ownership restrictions that limit broadcasters' ability to aggregate licenses and certain other media interests within a geographic area.¹⁰ Because of these regulations and local broadcasters' commitment to serving local communities, Congress, the Commission and the courts have recognized the contributions of local television to the welfare of the nation's citizens in numerous contexts.¹¹

⁷ See, e.g., Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, GEN. Docket No. 87-24, 3 FCC Rcd 5299, 5311 (1988) ("*Exclusivity Report & Order*") ("From a regulatory standpoint, broadcasters are governed by unique regulatory mechanisms that are designed to ensure they will serve their communities of license. In short, the Communications Act and our regulations ha[ve] held broadcasters to a standard of operating in the public interest, convenience and necessity, with obligations to serve their local communities.").

⁸ See 47 C.F.R. § 73.682 (specifying technical standards for transmission of analog television).

⁹ See *id.* §§ 73.670-73.673, 73.1910-73.1944, 73.4050.

¹⁰ See 47 C.F.R. § 73.3555(b)-(c); see also Telecommunications Act of 1996, S. Rep. No. 23, 104th Cong., 1st Sess. 69 (1995) ("Any modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services to our communities. Because local programming informs our citizens . . . and provides other community-building benefits, we cannot afford to undermine this valuable resource.") (additional views of Sen. Hollings); 141 Cong. Rec. E1571, E1573 (daily ed. Aug. 1, 1995) ("The drastic and indiscriminate elimination of mass media ownership rules . . . would eviscerate the public interest principles of diversity and localism. . . . Because American society is built upon local community expression, the policy favoring localism is fundamental to the licensing of broadcast stations.") (statement of Rep. Markey); Second Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules, MM Docket Nos. 91-221 and 87-8, 11 FCC Rcd 21655, 21659-60 (1996) (discussing the principal goals of the local television ownership rule).

¹¹ See, e.g., Cable Television and Consumer Protection and Competition Act of 1992, S. Rep. No. 92, 102d Cong., 2d Sess. 42 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1175 ("There is no doubt that, over the past forty years, television broadcasting has provided vital local services through its programming, including news and public affairs offerings and its emergency broadcasts.") ("*1992 Cable Act Senate Report*"); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("Congress designed th[e] system of [broadcast license] allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern. . . . [T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968))); Report and Order, In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals

Congress and the Commission have also regulated the actions of cable systems to effectuate the goal of localism. Among other things, cable systems are required to carry local television signals on-channel to facilitate ease of access¹² and on the basic tier to facilitate access at the lowest prices.¹³ Cable systems are also prohibited from degrading broadcast television signals¹⁴ and from importing distant signals if importation would dilute the contract rights of a local station to broadcast programming exclusively within that market.¹⁵

In considering how best to shape DTV cable carriage rules, the Commission should continually return to the basic goals of broadcast regulation.

2. Digital Television Is Intended To Replace Analog Television By Providing Better Quality Local Service With More Flexibility

Digital television was from the beginning designed to replace, not supplement, the current local television service. Thus, in 1992, the Commission decided to create an advanced television service within the existing television spectrum and to assign “loaner” channels to existing broadcasters to create this service.¹⁶ After a vigorous debate on the question of whether, notwithstanding the Commission’s decision, spectrum for digital television should be auctioned to any interested party, Congress endorsed the Commission’s initial determination. In the Telecommunications Act of 1996, Congress codified the eligibility criteria for allocating the

by Cable Television Systems, MM Docket No. 85-349, 1 FCC Rcd 864, 865 (1986) (discussing value of local broadcast television stations’ providing “a means for community self-expression” as one of rationales for original must-carry rules).

¹² 47 C.F.R. § 76.57.

¹³ *Id.* § 76.56(d).

¹⁴ *Id.* § 76.62(b).

¹⁵ *Id.* Part 76, Subpart F (giving broadcasters authority to enforce contractual exclusivity rights against cable systems).

¹⁶ See Second Report and Order/Further Notice of Proposed Rule Making in MM Docket 87-268, 7 FCC Rcd 3340, 3350-3353 (1992) (“*DTV Second Report & Order*”).

DTV “loaner” channels and authorized the Commission to go forward in assigning DTV licenses to existing broadcasters.¹⁷ In doing so, Congress made clear that the DTV service was to replace the analog service and that broadcasters would remain obligated to transmit at least one free over-the-air television service to their communities of license.¹⁸ In 1997, the FCC set forth a transition schedule by which broadcasters were expected to build DTV stations and migrate their audiences to DTV by 2006.¹⁹ Congress then codified this schedule in the Communications Act and made the ultimate transition from analog to digital television service dependent in part on cable penetration of DTV signals.²⁰

The Commission’s decisions to provide all full-power NTSC stations with DTV channels and to replicate local analog service areas demonstrate the Commission’s firm commitment to maintaining the integrity of the nation’s local broadcast service through the transition to digital. The Commission first committed to full accommodation of existing licensees and replication of their service areas in 1992.²¹ The concepts of full accommodation and replication reached fruition in 1997, when the Commission completed the almost unimaginably complex task of assigning DTV channels to approximately 1600 broadcast stations. These channel assignments allowed most stations to replicate or expand upon their

¹⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56, 107-08 (*codified at* 47 U.S.C. § 336(a)).

¹⁸ *Id.* (*codified at* 47 U.S.C. § 336(b)-(d)).

¹⁹ See 47 C.F.R. §§ 73.622-624; Fifth Report and Order, In re Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket 87-268, 12 FCC Rcd 12809 (1997) (“*DTV Fifth Report & Order*”) and Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, In re Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket 87-268, 13 FCC Rcd 6860 (1998).

²⁰ Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997), (*codified at* 47 U.S.C. § 309(j)(14)(B) (the “*1997 Budget Act*”).

²¹ See *DTV Second Report & Order*, 7 FCC Rcd at 3348-3349.

current service.²² Throughout this allotment/assignment process, the Commission has held fast to the concept, which MSTV has long supported,²³ that local television viewers should remain enfranchised throughout the DTV transition. They should be able to access the same local channels in the digital environment that they can watch in the analog environment (and more if possible).²⁴

Any regulator that is tempted to leave to the marketplace cable carriage questions should consider carefully the extent to which the marketplace is already skewed by regulatory policies designed to preserve local markets.²⁵ That official should also consider whether DTV, a replacement service, should be regulated in a way that is so different from, and contrary to, the service it will replace.

3. As Broadcasters Invest Substantial Sums To Comply With FCC DTV Regulation, The FCC Should Stay True To The Regulatory Course It Started

From the launch of the DTV regulatory process, it was clear that the Commission needed to adopt a DTV transmission standard, allot and assign DTV channels, and adopt DTV

²² See Sixth Report and Order, In re Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket 87-268, 12 FCC Rcd 14588 (1997) ("*DTV Sixth Report & Order*"); Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, In re Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket 87-268, 13 FCC Rcd 7418 (1998), *further recon. pending*. In reaching these decisions, the Commission wrestled with more than 500 sets of comments and almost 300 petitions and further petitions for reconsideration of the DTV allotment/assignment process.

²³ See *DTV Joint Broadcaster Comments II* at 24-28; *DTV Joint Broadcaster Comments III* at 4-10; *DTV Joint Broadcaster Comments IV* at 4-7, 11-16; *DTV Joint Broadcaster Comments V* at 8-10, 19-21; *DTV Joint Broadcaster Comments VI* at 4; *DTV Joint Broadcaster Comments VIII* at 15-20; and *DTV Joint Broadcaster Comments IX* at 4-9.

²⁴ Another rationale for replication is that the investments that broadcasters have made in particular markets should not be disrupted by a channel allocation plan that significantly reduces their audience reach.

²⁵ It is also relevant to consideration of these issues that FCC policies for decades allowed cable monopolies to build their businesses by retransmitting broadcast signals for free.

service rules.²⁶ These regulatory actions were expected to be completed in close proximity to each other (in fact, MSTV repeatedly urged that they be completed at the same time).²⁷ It was also clear that the Commission would, when digital cable services rolled out, have to ensure that there was sufficient commonality between DTV and digital cable technologies.²⁸ Under ordinary circumstances, the DTV transition schedule would not have been set and broadcasters would not have been required to put digital signals on the air until all the specifications for the service were established. However, the pressure to auction broadcast spectrum at the end of the DTV transition (the “give-back spectrum”) and to schedule such an auction in 2002 for budgetary purposes made it difficult for the Commission to complete the regulatory blueprint before ordering the launch of DTV. Thus, the *DTV Fifth Report & Order* that established *some* of the service rules for DTV left many others unsettled. Fundamental questions like public service

²⁶ See *DTV Second Report & Order*, 7 FCC Rcd at 3348-49; *DTV Joint Broadcaster Comments II* at 2-3, 39-40.

²⁷ See, e.g., *DTV Joint Broadcaster Comments II* at 2-10.

²⁸ In the DTV proceeding, the Commission clearly indicated its intention to ensure that DTV signals could be carried on cable to the consumer. See Tentative Decision and Further Notice of Inquiry, In re Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, 3 FCC Rcd 6520 (1988) (supporting interoperability); *DTV Second Report & Order*, (proposing that the advanced television system must support carriage of advanced television signals over cable systems); Memorandum Opinion and Order/Third Report and Order, In re Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, 7 FCC Rcd 6924 (1992) (“We agree with *NCTA* that cable delivery of a quality ATV signal is critical to public acceptance of ATV. We also agree with EIA/ATV Committee that, as a practical matter, any ATV system selected must support ATV carriage over cable systems.”)(emphasis added).

In another proceeding, on the analog cable interface standard, the Commission indicated that it would address digital compatibility issues in a follow-up to Report and Order, Implementation of Section 17 of the Cable Television Consumer and Protection Act of 1992, ET Docket No. 93-7, 9 FCC Rcd 1981, 1982 (1994) (“[S]tandards for cable digital transmissions are desirable. These standards will be needed to ensure that compatibility is maintained as new digital cable technologies are introduced....[We] will initiate a separate action on these issues as is necessary to assure continuing compatibility in the future.”) See also *id.* at 2005 (recognizing the future need to deal with “the relationship of the cable digital system to the terrestrial broadcast ATV standard and multimedia”). The Commission restated its commitment to “initiate a separate proceeding on [cable]digital standards issues in the future” in its 1996 reconsideration of the compatibility issues. See Memorandum Opinion and Order, Implementation of Section 17 of the Cable Television Consumer and Protection Act of 1992, ET Docket No. 93-7, 11 FCC Rcd 4121, n.9 (1996).

obligations, closed captioning implementation, fees for ancillary and supplementary services, and cable carriage rules were all deferred.²⁹ This deferral created a disjuncture between when the DTV service begins (with all the ensuing expenditures) and when the contours of its regulation are finally and fully defined.

This disjuncture places both broadcasters and their viewers in a difficult position. Broadcasters are investing heavily in DTV implementation.³⁰ Of the 24 stations that volunteered to go on the air in November, almost all are expected to meet their deadlines.³¹ An additional 18 stations in the major cities are also planning to go on the air in November.³² Many stations are far ahead of the Commission's schedule in applying for DTV construction permits as hundreds in large and smaller markets install antennas, build towers, and purchase studio and production equipment. It is important that these stations, and those that are on deck, know the rules of the

²⁹ See *DTV Fifth Report & Order*, 12 FCC Rcd 12809 (1997).

³⁰ For example, larger groups like Hearst-Argyle Television are committed to spending \$6-\$8 million on digital conversion in 1998 and another \$10-\$12 million in 1999. See Steve McClellan, "Ready and Not, Here Comes DTV," *Broadcasting & Cable* at 29 (March 9, 1998). Smaller station owners, like Morgan Murphy Stations, are investing what is a lot of money given the relative sizes of the stations (see, e.g., *The Transition to High Definition Television: Hearing Before the Senate Comm. on Commerce, Science and Transportation Committee*, 105th Cong. (July 8, 1998) (Testimony of Elizabeth Murphy Burns) (Our "stations are buying upconverters and downconverters, master control switching equipment, encoders and decoders, satellite receivers, cameras and newsgathering equipment. Just for the basics, the average bill runs about \$2-\$4 million per station. Our Spokane station is currently refitting its entire news studio so that it will be capable of local DTV production. It will spend from between \$3 to \$10 million depending on how much high definition production it ultimately does.")). See also "Blazing a Trail in Philadelphia," *Broadcasting & Cable* at 19 (Apr. 8, 1998); "Leading the Charge from South Bend," *id.* at 20; "Ahead of Schedule in Atlanta," *id.* at 22; "Out Front in Honolulu," *id.* at 24; "All Systems are Go at KOMO-TV," *id.* at 26; "St. Louis likes HDTV," *id.* at 28; "WFAA-TV is Off the Ground in Dallas," *id.* at 30; "Moving Fast in Madison," *id.* at 31.

³¹ As of May 1, only one station appeared unlikely to make the deadline at all and several others volunteered sister stations in other markets in case the volunteer stations confront insurmountable tower problems. The affiliates of the four largest networks in the top ten markets are required to be on the air by May 1, 1999. Thirty-seven of those 40 stations timely filed their applications for DTV construction permits; three requested extensions to resolve tower problems. See *The Transition to High Definition Television: Hearing Before the Senate Comm. On Commerce, Science and Transportation*, 105th Cong. (July 8, 1998) (Testimony of Gregory M. Schmidt).

³² See Paul Farhi, "Four Area TV Stations to Offer Digital Broadcasts", *Washington Post*, Oct. 7, 1998 at C11.

service they are launching. It is important for the public to know what they will be buying when they purchase a DTV receiver or other digital device – what services they will be accessing, how those services will be regulated, and what compatibility they can expect among various services and pieces of equipment. To the extent that the Commission further delays completing the DTV rulemaking process, these needs will not be met.

B. The Communications Act Requires The Commission To Adopt Cable Carriage Rules Promptly

The *Notice* seeks comment on how the Commission should implement the cable carriage provisions of the Communications Act with respect to DTV.³³ Those provisions, found in Sections 614 (carriage of local commercial television signals), 615 (carriage of noncommercial educational television signals), 325 (retransmission consent) and 623 (rate regulation), govern both how local signals are carried and whether they are carried. This section addresses the extent to which these statutory provisions, and in particular Section 614, apply to DTV signals and the scope of the Commission's discretion in adapting its rules for DTV.³⁴ Section II(A) addresses how, and Section II(B) addresses whether, local DTV signals should be carried.

1. The Commission Must Implement The Communications Act's Cable Carriage Provisions With Respect To DTV

The *Notice* recognizes that the FCC has authority to adopt DTV cable carriage rules. In fact, the words and intent of the Communications Act's cable carriage provisions *require* FCC action in this area. Further, the Act's provisions relating to the timing of the DTV

³³ *Notice*, ¶¶ 32-38, 55-71, 75-93.

³⁴ We focus almost entirely on Section 614, but similar arguments could be made for the applicability of Section 615 to noncommercial stations' DTV signals.

roll-out leave the Commission with very little discretion as to when these rules must come into effect.

a) The statutory cable carriage provisions apply without regard to format

The Communications Act prescribes cable operators' obligations to carry "signals of local commercial television stations, and qualified low power stations."³⁵ It specifies a ceiling for the number of signals any given system must carry and how a cable system should select such signals.³⁶ It specifies the content that must be carried of each of the "local commercial television stations" on a cable system,³⁷ the obligation of cable systems to carry local television stations' signals without material degradation,³⁸ and the obligation of cable operators to transmit must carry signals on certain channels.³⁹ A "local commercial television station" is defined as "any full power [commercial] television broadcast station".⁴⁰ The Communications Act prescribes similar obligations with respect to the "signals of qualified noncommercial educational television stations."⁴¹

By its terms, the Act applies the cable carriage rules to the "signals" of authorized full power (and, to some extent, low power) television stations, regardless of whether those signals are in the DTV or NTSC format. Therefore, Section 614's cable carriage requirements apply on their face to local commercial DTV, as well as NTSC, signals.

³⁵ 47 U.S.C. § 534(a).

³⁶ 47 U.S.C. § 534(b)(1)(2).

³⁷ 47 U.S.C. § 534(b)(3).

³⁸ 47 U.S.C. § 534(b)(4).

³⁹ 47 U.S.C. § 534(b)(6).

⁴⁰ 47 U.S.C. § 534(h)(1)(A).

⁴¹ 47 U.S.C. § 535.

b) The Communications Act expressly requires application of cable carriage rules to DTV signals

The Act goes out of its way to instruct the Commission to apply its cable carriage rules to DTV signals in order to effectuate Congress' goals in the DTV environment. By September 1992, when Congress enacted the *1992 Cable Act*,⁴² the Commission had issued its Second Report and Order in the advanced television proceeding.⁴³ This Report and Order established the framework under which the Commission would assign transitional DTV channels to broadcasters and repossess an unused channel when the transition to advanced television was complete (a 15 year period was established).

Congress was mindful of this compulsory transition and acted on it. Section 614 of the Communications Act provides that, "[a]t such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards."⁴⁴ According to the Conference Report accompanying the *1992 Cable Act*, the purpose of requiring the Commission to reassess the cable carriage rules was to ensure that advanced television signals would be carried "in accordance with the objectives" of Section 614.⁴⁵

⁴² Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §521 *et seq.*) (the "*1992 Cable Act*").

⁴³ See *DTV Second Report & Order*.

⁴⁴ 47 U.S.C. §534(b)(4)(B). The Commission delayed by more than 18 months fulfillment of this mandate to initiate a DTV cable carriage proceeding. According to the Act, it should have initiated such a proceeding in December 1996, when it adopted a DTV transmission standard.

⁴⁵ H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess., at 67 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1249 ("*1992 Cable Act Conference Report*").

c) The objectives of the cable carriage provisions require their application to DTV

What was Congress trying to accomplish with the *1992 Cable Act* provisions governing cable carriage of broadcast signals and does the same reasoning apply to the DTV replacement service? Section 614 reflects Congress' policy judgment, as upheld by the Supreme Court, that local broadcast signals should be carried on cable in a way that preserves the integrity of those signals and serves the public interest.⁴⁶ The legislative history makes clear that Congress's goal in enacting the legislation was to preserve the valuable local broadcast service. Congress saw a threat to this service from cable's exercise of its considerable and growing market power to exclude, relocate or degrade local broadcast signals in a manner that could erode local broadcast viewership and ultimately threaten the viability of the local broadcast system.⁴⁷ As the Senate Report explains, Congress was concerned that cable operators had both the opportunity and incentive to engage in anti-competitive behavior that would deprive local broadcasters of access to cable subscribers.⁴⁸ Moreover, that concern was "greatly elevated because of the importance of the American system of broadcasting and what it means to the delivery of information of import to communities. It is for this reason that the legislation

⁴⁶ *See id.*

⁴⁷ *See, e.g.,* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 40-45, *reprinted in* 1992 U.S.C.C.A.N. at 1174-78 (*1992 Cable Act House Report*); *1992 Cable Act Conference Report*, at 75, *reprinted in* 1992 U.S.C.C.A.N. at 1257. According to the Commission, the *1992 Cable Act* "and its legislative history indicate that Congress has determined that the must carry and channel positioning provisions of the 1992 Act are needed to protect the system of free, over-the-air television broadcasting and to promote competition in local markets. Specifically, Congress has concluded that such regulation is needed to ensure a competitive balance between cable systems and broadcast stations." *See* Notice of Proposed Rule Making, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 7 FCC Rcd 8055, 8056 (1992).

⁴⁸ *1992 Cable Act Senate Report* at 45, *reprinted in* 1992 U.S.C.C.A.N. at 1178.

incorporates a special provision focusing . . . [on] both the primary concern of carriage and the secondary concerns of the terms of carriage.”⁴⁹

The pursuit of Congress’ goals – the inhibition of anti-competitive practices by cable providers and the preservation of the local broadcast service – remains vital during the transition to DTV. As discussed below in Section II(B)(1), the threat of anti-competitive practices on the part of cable to disadvantage DTV is potent. Cable operators remain vertically integrated and are becoming more horizontally integrated. They control the gateway to almost 70% of American television households and increasingly make significant inroads into local advertising markets. As a result of all these factors, they have strong incentives to exclude or disadvantage local television signals that compete for advertising, particularly when these signals might be of higher technical quality. Broadcasters whose DTV signals are not carried fairly or at all on cable will face economic harm of the highest order. Lacking the chance to “sell” their product to the public, they could be forced to operate two signals at great expense for an unlimited period of time, all the while losing existing viewers to digital services that have made it through the cable gateway.

2. The Act’s DTV Provisions Require The Prompt Adoption of Cable Carriage Rules

The *Notice* questions whether the Commission has authority to implement cable carriage rules after the transition to DTV is complete and NTSC signals have gone off the air.⁵⁰ A plain reading of Section 614, which concerns the “signals of local commercial television stations”, suggests that the cable carriage principles set forth in those provisions already *do* apply to DTV signals. Clearly, however, FCC promulgation of rules that translate those principles for

⁴⁹ *Id.* at 45-46, *reprinted in* 1992 U.S.C.C.A.N. at 1178-79.

DTV is desirable, as Section 614 recognizes by requiring the Commission to initiate a rulemaking that does just that. We do not believe that, in adopting such rules, the Commission may defer their effect until the transition to DTV is complete.

First, so long as the Commission waits to implement Section 614 with respect to DTV, there will be a statutory mandate that has gone unheeded.⁵¹ Clearly, the Commission cannot implement this mandate by November, but we urge it to curtail this period of uncertainty and non-implementation of the Communications Act.

Second, the Commission must be guided by the DTV transition schedule it mandated in the DTV proceeding and that Congress codified in the *1997 Budget Act*. According to the FCC's schedule, all commercial DTV stations must be on the air by 2002. By 1999, stations are scheduled to serve more than half the nation with DTV signals.⁵² Stations must transmit DTV signals for the same hours that they transmit their analog signals, usually at an additional expense of \$10,000-\$20,000 a month in terms of operating costs (this is on top of the \$2-10 million per station to launch DTV). For the first several years of the transition, these broadcasts may be viewed by very few because the penetration of DTV sets and set-top box converters will be low. But it was understood when the Commission adopted its aggressive build-out schedule in 1997 that the lag between DTV availability and consumption would be

⁵⁰ Notice, ¶¶ 34-36.

⁵¹ "It is clear that an agency must implement its statutory powers where the statute itself or the legislative history indicates that Congress intended to require implementation . . . An administrative agency cannot abdicate its responsibility to implement statutory standards under the guise of determining that inaction is the best mode of implementation." *United States v. Markgraf*, 736 F.2d 1179, 1182-3 (7th Cir. 1984); see also, e.g., *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 394 (1974) (holding that where statute obligated agency to ensure that gas prices were just and reasonable, agency had no discretion to decline to adopt standards regulating prices charged by one class of producers); *Pulido v. Heckler*, 758 F.2d 503, 506-07 (10th Cir. 1985); *Animal Defense Legal Fund, Inc. v. Glickman*, 943 F. Supp. 44, 59-61 (D.D.C. 1996).

⁵² See *DTV Fifth Report & Order*, 12 FCC Rcd at 12835-12848.

inevitable. The rapid build-out was designed to generate momentum for DTV and consumer demand sufficient to propel the transition to a timely end.⁵³

The *1997 Budget Act* codified the Commission's model for a rapid DTV transition, and made explicit what had only been implicit in the Commission's build-out schedule – that the realization of the DTV transition timetable would depend on consumers' ability to access DTV signals through cable. The *1997 Budget Act*, in effect, defines the point at which the DTV transition schedule will be deemed a failure in a given market and broadcasters in that market will be excused from returning their analog channels. One such point is when 15% or more of the television households in a market do not receive the DTV signals of each of the local broadcast stations in that market through cable and are not otherwise able to receive those DTV signals.⁵⁴ The failure of markets across the country to meet the penetration levels specified in the *1997 Budget Act* would seriously, perhaps permanently, disrupt the nation's system of local broadcasting. It would place that system in limbo between an analog and digital service, forcing broadcasters to run two stations at considerable expense and to spread programming, technical and advertising resources too thin to provide a first class service in either the digital or analog format. Delay and uncertainty in the transition to DTV would also severely disrupt the programming and consumer equipment markets, leaving programming distribution stranded halfway between the analog past and the digital future.

Given the statutory and regulatory imperatives relating to DTV, the Commission does not have the choice to delay implementation of cable carriage rules until “after” the

⁵³ See *id.* at 12842-12843; Speech by Reed E. Hundt at Variety/Schroeder Wertheim Media Conference, New York, NY (April 1, 1997).

⁵⁴ As the *Notice* remarks, the *1997 Budget Act* recognizes that, “the participation by the cable industry during the transition period is likely to be essential to the successful introduction of digital broadcast television and the rapid return of the analog spectrum to the Commission.” *Notice*, ¶ 14.

transition. Without cable carriage on reasonable terms in the early days of the transition, there will be no “after” because the statutory definition of a successful transition will not be met. Presumably, in suggesting the possibility of rules that would kick in after the transition, the Commission intends to rely on marketplace negotiations to ensure consumer access to DTV signals over cable.⁵⁵ We do not believe Section 614 of the Communications Act permits the Commission to take this risk and leave undefined the legal obligations of cable systems with respect to DTV signals. As importantly, we do not believe that exclusive reliance on industry negotiations has to date served the public well. Delay in settling the questions of how cable systems should transmit DTV and other digital signals to consumer equipment has already resulted in the production of first-generation digital consumer equipment that is sub-optimal in terms of its functionality and longevity.⁵⁶ Delay has also clouded or delayed negotiations between local broadcasters and cable systems and created an environment of uncertainty for the roll-out of DTV.

⁵⁵ The negotiations between broadcasters and cable systems for carriage of the DTV signals, as reported in the press, have almost all involved the broadcast networks negotiating for their owned and operated stations. See, e.g., Paige Albiniak, “No Must, No Fuss: Big Four Broadcast Networks, Cable Operators Seem In Sync On Will Carry,” *Broadcasting & Cable*, at 4 (Apr. 27, 1998). Obviously, the networks, which function as cable program suppliers and own among the strongest local stations in the nation, are differently situated from the mainstream of U.S. broadcast station owners. Moreover, it is unclear exactly what carriage terms these negotiations have produced and whether they are either broadly applicable or in the public interest.

⁵⁶ See, e.g., Joel Brinkley, “Problems Abound as Television Industry Moves to Digital Broadcasting,” *The New York Times* (June 8, 1998) (“the first digital sets will be incapable of receiving any high-definition programming if it comes in via cable.”); “Malone Says TCI Will Require Government Order to Carry 1080i Signal,” *Communications Daily* (May 6, 1998); Transition to High Definition Television: Hearings Before the Senate Comm. on Science, Commerce and Transportation, 105th Cong. (July 8, 1998) (Testimony of Alan McCollough) (explaining that first generation digital sets will have difficulty connecting to digital cable boxes); Letter from Garry Shapiro, CEMA to Chairman Kennard (Sept. 10, 1998) (urging harmonization of the OpenCable™ initiative and CEMA open standard-setting efforts and expressing concern that “without the full and open participation of interested parties like broadcasters, content providers, and consumer electronics manufacturers, CableLabs may devise an overly complex and unnecessarily costly [interface] standard” between cable set-top boxes and other digital devices).

III. SPECIFIC POLICY DECISIONS

A. The Commission Should Settle The Cable Carriage Issues That Are Not Dependent On Particular Must Carry Requirements

Less than a quarter of the 48-page *Notice* directly concerns the implementation of the Communications Act's must carry requirements. The rest of the *Notice* addresses equally important questions about how DTV signals should be carried through a cable system, regardless of what particular must carry formula the Commission adopts. Some of these questions are raised by rules unrelated to Section 614 (*e.g.*, syndicated exclusivity and network non-duplication rules and the basic service tier rule). Others are raised by the rules implementing Section 614, but are independent of the Commission's DTV must carry decision (*e.g.*, the non-degradation rule and the requirement that cable carry the primary video and other parts of the signal). Others are related to the adoption of must carry rules, but not to any particular formulation of the rules (*e.g.*, the channel placement rule). Still others have no precise analogs in the existing rules, but must be addressed in order to implement the statutory goals behind those rules (*e.g.*, electronic program guides). Resolution of these issues is crucial if broadcasters are to negotiate effectively with networks and syndicators and to develop business plans for use of the DTV channel. Broadcasters must know with some certainty what rights they have under law and what they will need to bargain for.

Many of these questions implicate the technical relationship among DTV, cable systems and consumer electronic equipment – issues the *Notice* raises in its digital compatibility section.⁵⁷ Rather than address these issues out of context, we address specific features of digital compatibility as those features are implicated by cable carriage (or non-carriage) of specific

⁵⁷ *Notice*, ¶¶ 17-31.